Kumpulan Protection Sdn Bhd v Global Globe (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP PETITION NO 28NCC-353–05 OF 2015
KHADIJAH IDRIS JC
11 APRIL 2016

Company Law — Winding up — Petition — Whether intitulement must specify specific provision of law — Whether irregular — Whether defective — Whether fatal — Companies Act 1965 s 218 — Companies (Winding-Up) Rules 1972

The petitioner and the respondent agreed to settle a monetary claim made by the petitioner against the respondent at the sessions court for the amount RM128,911.26. Both parties mutually agreed for the respondent to pay the judgment sum in ten equal monthly instalments in the sum of RM12,891.12. A consent judgment was recorded. Due to the respondent's failure to comply with the consent judgment, the petitioner served a notice under s 218 of the Companies Act 1965 ('the Act') demanding the respondent to payment the judgment sum. The respondent neglected to pay or satisfy the judgment sum. By reason of the respondent's failure, the respondent was deemed insolvent and unable to pay its debt and as such the petition was presented, seeking for an order that the respondent be wound up. The respondent argued that the consent judgment was erroneous and the winding up proceedings were irregular and therefore fatal. The issues that arose were whether the petition was defective on the grounds that technical defect, namely the intitulement did not specify the correct provision of the law on which the petitioner was relying on; and the consent judgment which formed the basis of the petition was a genuine mistake.

Held, allowing the petitioner's petition:

(1) The intitulement to the petition presented by the respondent did not make specific reference to any of the sub-sections under s 218(1) of the Act which provides for various circumstances in which a company may be wound up. However, the Act and the Companies (Winding-Up) Rules 1972 do not require the specific sub-section of s 218 be stated in the intitulement of a winding up petition. Since there is no statutory requirement to do so, the petition was not defective (see paras 21 & 27).

(2) The petition was not concerned with the merits of the consent judgment. It did not matter even if the respondent had filed a fresh suit to set aside the consent judgment. What mattered was the petitioner, as a creditor, pursued its right to recover the judgment sum from the respondent, as a

debtor, pursuant to a notice issued under s 218 of the Act. The respondent did not adduce evidence to rebut the insolvency presumption even though it said it was solvent and had financial viability to pay. Under such circumstances, the presumption remained and the court was empowered to exercise its discretionary power to wind up the respondent (see para 44).

[Bahasa Malaysia summary

Pempetisyen dan responden bersetuju untuk menyelesaikan tuntutan kewangan yang dibuat oleh pempetisyen terhadap responden di mahkamah sesyen bagi wang sejumlah RM128,911.26. Kedua-dua pihak secara bersama bersetuju untuk responden membayar jumlah penghakiman sebanyak sepuluh ansuran bulanan yang sama dalam jumlah RM12,891.12. Penghakiman izin direkodkan. Akibat kegagalan responden untuk mematuhi penghakiman izin, pempetisyen menyerahkan notis di bawah s 218 Akta Syarikat 1965 ('Akta') menuntut responden membayar jumlah penghakiman. Responden cuai untuk membayar atau mematuhi jumlah penghakiman. Atas sebab kegagalan responden, responden dianggap tidak mampu bayar dan tidak dapat membayar hutangnya dan petisyen sedemikian telah dikemukakan, memohon untuk perintah bahawa responden digulung. Responden berhujah bahawa penghakiman izin adalah salah dan prosiding penggulungan adalah tidak teratur dan oleh itu cacat. Isu yang berbangkit adalah sama ada petisyen adalah cacat atas alasan kecacatan teknikal, iaitu intitulemen tidak menetapkan peruntukan betul undang-undang yang mana disandarkan oleh pempetisyen; dan penghakiman izin yang membentuk asas petisyen adalah kesilapan yang benar.

Diputuskan, membenarkan petisyen pempetisyen:

(1) Intitulemen kepada petisyen dikemukakan oleh responden tidak membuat rujukan spesifik kepada mana-mana sub-seksyen di bawah s 218(1) Akta yang memperuntukkan bagi pelbagai keadaan bagaimana syarikat boleh digulung. Walau bagaimanapun, Akta dan Kaedah-Kaedah (Penggulungan) Syarikat 1972 tidak memerlukan sub-seksyen spesifik s 218 untuk dinyatakan di dalam intitulemen petisyen penggulungan. Memandangkan tidak terdapat keperluan statutori untuk berbuat sedemikian, petisyen tidak cacat (lihat perenggan 21 & 27).

(2) Petisyen bukan berkenaan dengan merit penghakiman izin. Ia tidak penting walaupun responden telah memfailkan tindakan baru untuk mengetepikan penghakiman izin. Apa yang penting adalah pempetisyen tersebut, sebagai pemiutang, memburu haknya untuk mendapatkan balik jumlah daripada responden, sebagai penghutang, berikutan notis yang dikeluarkan di bawah s 218 Akta. Responden tidak mengemukakan keterangan untuk mematahkan anggapan ketaksolvenan walaupun ia

menyatakan yang ia adalah solven dan mempunyai keupayaan kewangan untuk membayar. Di bawah keadaan ini, anggapan tersebut kekal dan mahkamah diberi kuasa untuk menjalankan kuasa budi bicara untuk menggulung responden (lihat perenggan 44).] A

Cases referred to B

Au Yuan Chee v Lim Leong Thiam & Ors (1956) 2 MC 260 (refd)
Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457, CA (refd)
Gulf Business Constructions (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34; [2010] 8 CLJ 775, CA (refd) C
Ho Siew Choong & Ors v Everworth Sdn Bhd [2005] 2 CLJ 273, CA (refd)
Juara Aspirasi (M) Sdn Bhd v Tan Soon Ping [2012] 1 MLJ 50; [2011] 1 LNS 1952, CA (refd)
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2011] 1 CLJ 947, HC (refd) D
Perwira Affin Bank Bhd v Lim Ah Lee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (refd)
Petro-Pipe Industries (M) Sdn Bhd v Fieldwork Engineering Sdn Bhd [2003] 1 MLJ 417; [2003] 1 CLJ 777, HC (refd)
Public Bank Bhd lwn Search Realty (M) Sdn Bhd [2001] 3 MLJ 119, HC (folld) E
Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (administratrix of the estate of Mohamad Shariff bin Haji Hussain) [2000] 6 MLJ 155; [2000] 1 LNS 197, HC (refd)

Legislation referred to F

Companies (Winding-Up) Rules 1972 rr 8, 22
Companies Act 1965 ss 128, 218, 218(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h) , (2)(a), (2)(b), 221
Courts of Judicature Act 1964
Rules of Court 2012 O 14, First Schedule, Forms 2, 3 G

JY Kuah (Ming, Yee & Co) for the petitioner.
Ragumaren Gopal (G Ragumaren & Co) for the respondent.

Khadijah Idris JC: H

[1] The petitioner, Kumpulan Protection Sdn Bhd (No Syarikat 106999-X) and the respondent, Global Globe (M) Sdn Bhd (No Syarikat 556853-V) are both private company incorporated under the Companies Act 1965 ('Act 125'). I

[2] On 11 May 2015 petitioner presented a petition vide 28NCC-353–05 of 2015 ('petition') for the respondent to be wound up in accordance with Act 125 and for the official receiver to be appointed as provisional liquidator.

[3] On 5 February 2016 after hearing submission from both parties, this court made an order in terms of the prayer in the petition. The respondent appealed against the order.

FACTUAL BACKGROUND

[4] On 21 August 2014 the petitioner and respondent agreed to settle a monetary claim made by the petitioner against the respondent in Suit No A52C-9–02 of 2014 at the Kuala Lumpur Sessions Court ('KLSC suit') for the amount RM128,911.26 ('judgment sum'). Both parties had mutually agreed for the respondent to pay the judgment sum in ten equal monthly instalments in the sum of RM12,891.12 each beginning 30 September 2014 and ending on 30 June 2015 as full and final settlement of the amount claimed by petitioner. Pursuant thereto a consent judgment was recorded on 21 August 2014 ('Consent Judgment' — see encl 10 exh 'CYC 1').

[5] Due to the respondent's failure to comply with the consent judgment, the petitioner served a notice under s 218 of Act 125 demanding respondent to pay the judgment sum together with interest of 5%pa on the said sum from 30 November 2014 to date of full realisation and costs within 21 days from the date of receipt of the said notice.

[6] The respondent neglected to pay or satisfy the judgment sum demanded or any part thereof or to make any offer to secure or compound the said sum within the stipulated period.

[7] By reason of the respondent's failure, the respondent is deemed insolvent and unable to pay its debt and as such the petition was presented, seeking for an order that the respondent be wound up.

[8] respondent opposed the petition. In essence the respondent's case ('encl 9') is that the consent judgment was erroneously entered because there was no privity of contract between both parties. As such the respondent is not indebted to the petitioner. The respondent further argued even if the respondent is liable to the petitioner, the judgment sum is not due. Under the circumstances the winding up proceedings which is based on the consent judgment is untenable.

[9] The facts related by the respondent in encl 16 in support of their contention that the consent judgment was a mistake is as follows:

(a) vide a letter of award dated 10 February 2010, the respondent appointed one Dinamik Jana as a subcontractor to execute services works ACMW, Fire Protection Services, Kitchen Equipment and LPG System for a

project known as 'Cadangan Pembangunan yang Mengandungi Ibu Pejabat dan Dewan Besar LKIM di atas PT 1118 dan PT 1119 Mukim Dengkil, Daerah Sepang, Selangor Darul Ehsan ('Contractual Works Contract') worth RM9,807,162. Subsequently both parties executed an agreement in respect of the contractual works on 15 March 2010;

(b) thereafter vide letter of award of the same date, Dinamik Jana appointed the petitioner as a subcontractor to execute works in respect of Fire Protection System under the contractual works contract. The value of the said contract is RM1,165,000;

(c) according to the petitioner, though they are appointed by Dinamik Jana to execute works of the Fire Protection System, Dinamik Jana had by letter dated 23 December 2009 (encl 9 exh 'ZBR 9') informed the petitioner that Dinamik Jana '... shall irrevocably authorized Global Globe (M) Sdn Bhd to make direct payment to you for all verified and true claims by you against us ...';

(d) vide letter dated 25 May 2013 to the respondent, the petitioner submitted a claim for payment outstanding in the amount of RM128,911.26 for works done (encl 9, exh 'ZBR 9');

(e) further thereto, the petitioner issued another letter dated 4 November 2013 (encl 10, exh 'CYC 4', also found in encl 9, exh 'ZBR 9') to the respondent requesting for remittance of the amount RM128,911.26. One Hanis Abdul Rahman had, on behalf of the respondent on 8 November 2013, acknowledged in writing on the said letter that the said amount is outstanding and owing to the petitioner;

(f) the respondent failed to pay the said sum which prompted the petitioner to file the KLSC suit. In their statement of defence, the respondent disputed the claim and denied owing such sum. It is to be noted that facts relating to privity of contract was not pleaded in the respondent's statement of defence (encl 9 exh 'ZBR 4'). The respondent merely denied it is indebted to the petitioner for the judgment sum;

(g) the petitioner filed for summary judgment under O 14 of the Rules of Court 2012 ('the ROC'). It is in the affidavit opposing the summary judgment did the respondent raised the issue of privity of contract. The respondent also contended Hanis Abdul Rahman who had acknowledged the sum as outstanding and owing was a general clerk and was not authorised to do so on behalf of the respondent. The respondent further stated the letter dated 4 November 2013 (encl 10, exh 'CYC 4', also found in encl 9, exh 'ZBR 9') is not in their records;

(h) before O 14 application was heard, parties had agreed to settle the matter and the consent judgment was recorded. The respondent having failed to comply with the consent judgment and thereafter the statutory notice under s 218 of Act 125, the petitioner initiated winding up proceeding in May 2015;

(i) on 11 August 2015 the respondent received a letter from Maju Integrated Consultant (encl 9, exh 'ZBR 11') informing certain works under the fire protection system contract was not completed by the petitioner;

(ii) the respondent then filed an action, Suit No A52C-44–10 of 2015, in the sessions court on 9 October 2015 to set aside the consent judgment and an application to stay and stop the effect of the consent judgment. On 1 December 2015 the sessions court granted a stay of the execution of the consent judgment;

(iii) in opposing the petition (encl 9), the respondent forwarded the same ground it opposed the petitioner's application for summary judgment in the KLSC suit, namely, no privity of contract between the petitioner and the respondent. In addition to that the respondent now said, after receiving letter from Maju Integrated Consultant and upon perusal of the contractual works contract document, the respondent realised the judgment sum is part of the retention money which they have yet to received. According to the respondent the retention money has yet to be released to the respondent because Certificate Making Good Defects ('CMGD') has not been issued. The respondent further argued the CMGD has not been issued because there are some repair works which the petitioner needs to complete. Under the circumstances the respondent argued the sum RM128,910.26 is not due to the petitioner because of some unfinished works which the petitioner need to do. As such the respondent's agreement to enter into the consent judgment to agree to pay the judgment sum was a mistake;

(iv) further thereto on 18 December 2015 the respondent applied, vide encl 16, for an order that the winding up petition filed against it by the petitioner be stayed. The application was made pursuant to s 221 of Act 125 and/or under the inherent jurisdiction of this court. In support of the stay application, the respondent adopted the affidavit opposing the petition and argued that if the petition is not stayed the respondent would suffer grave injustice should the respondent succeeded in setting aside the consent judgment.

Having heard both parties' submission, this court dismissed encl 16 with cost and proceeded to hear the petition. Order in terms of the petition was granted on 5 February 2016.

THE PETITIONER'S SUBMISSION

[10] The petitioner's counsel submitted the allegations by the respondent that the consent judgment was a mistake is a matter to be dealt by the sessions court in the respondent's writ action and not by this winding up court. This court should only be concerned with the ability of the respondent to settle the debt due and owing to the petitioner.

[11] In respect of the genuine mistake alleged by the respondent, the petitioner submitted that the respondent was at all material times represented and had sought legal advice in respect of the KLSC suit and that they are aware of or have knowledge on all documents, correspondences between parties and the cause papers filed in the KLSC suit. When the consent judgment was recorded, the respondent was represented and properly advised by their solicitors and therefore should understood their rights at all material times. In any event the petitioner argued the winding up proceeding is not an execution proceeding based on the consent judgment but the inability of the respondent to pay its debt.

[12] The petitioner contended that the petition is in order because a registrar's certificate was issued. The respondent did not, at all material times, dispute it. Failure by the respondent to comply with the statutory notice (issued pursuant to s 218(2)(a) of Act 125 has given rise to a statutory presumption the respondent is insolvent and/or unable to pay all existing debts owing to all its creditors. This presumption remains as it was not and/or never rebutted by the respondent.

THE RESPONDENT'S SUBMISSION

[13] Counsel for the respondent contended since there is no privity of contract between the respondent and the petitioner, the petitioner has no right to sue the respondent in the KLSC suit.

[14] Alternatively if privity is established, the respondent contended there is no monies due and therefore no debt due. Under the circumstance there cannot be a creditor/debtor relationship between the petitioner and the respondent. The issue of the respondent's inability to pay its debt does not arise. So does the issue of insolvency. Based on the foregoing, the respondent's counsel contended the presumption that the respondent is unable to pay its debt is rebutted.

[15] The respondent also contended the petitioner has failed to prove the respondent is unable to pay its debt. The respondent further contended it is solvent and has financial viability to pay whatever legitimate claims against the respondent.

[16] As regards to the petition, the respondent submitted it is irregular because the intitulement does not specify the correct provision of the law, namely s 218(1) of Act 125 and any of the limbs from ss 218(1)(a) to 218(1)(h) of Act 125, on which the petitioner is relying on. Since winding up proceedings are highly technical and penal in nature, any irregularity or defect is fatal.

ISSUE

[17] In essence the issue which requires consideration is whether the petition is defective on the following ground:

(a) technical defect, namely the intitulement did not specify the correct provision of the law on which the petitioner is relying on; and

(b) the consent judgment which forms the basis of the petition was a genuine mistake.

REASONS

Whether petition is defective because intitulement does not specify the correct provision of the law on which the petitioner is relying on

[18] It is to be noted the respondent did not, in any of its affidavit (including affidavit opposing the petition), raised the technical defect issue. The petitioner had, in its affidavit in reply affirmed by its managing director (encl 10) averred at para 8(ii) that the respondent has failed to raise any technical defect in the petition. The respondent vide its director responded in its affidavit (encl 11, para 6) and averred that the petition was defective because the consent judgment was erroneous and under that circumstance there is no debt due to the respondent. Even though the respondent was provoked to find technical fault with the petition, it did not raised any then. Nevertheless the technical defect issue will be discussed in the following paragraphs.

[19] The Companies (Winding-Up) Rules 1972 ('Winding-Up Rules') made under the Companies Act 1965 (Act 125) and Courts of Judicature Act 1964 (Act 91) regulates the proceedings and procedure in relation to winding up of companies. Rule 22 of the Winding-Up Rules requires petition for the winding up of a company may be either in Forms 2 or 3 of the First Schedule, with such variations as circumstances may require. For the purpose of this instant case, Form 2 is relevant. Rule 8 of the Winding-Up Rules requires every

proceeding in a winding up matter to be dated and shall, with any necessary additions, be intituled as follows:

IN THE HIGH COURT IN ..... AT .....

COMPANIES (WINDING-UP) NO ..... OF .....

In the matter of the Companies Act, 1965

and

In the matter of .....

[20] The intitulement to the petition as evidenced in encl 1 is as follows:

In the matter of GLOBAL GLOBE (M) SDN BHD (Company No: 556853-V)

AND

In the matter of Section 218 of the Companies Act, 1965

BETWEEN

KUMPULAN PROTECTION SDN BHD ... PETITIONER

A (Company No: 106999-X)

AND

B

GLOBAL GLOBE (M) SDN BHD ... RESPONDENT

(Company No: 556853-V)

C

PETITION

...

D

[21] It is indeed true that the intitulement to the petition presented by the respondent did not made specific reference to any of the sub-sections under s 218(1) Act 125 which provides for various circumstances in which a company E may be wound up. In this respect it must be noted however that Act 125 and the Winding-Up Rules do not require the specific sub-section of s 218 to be stated in the intitulement of a winding up petition.

[22] Nevertheless the respondent submitted it is mandatory and the failure F to do so is fatal. In this respect, the respondent referred this court to *Ho Siew Choong & Ors v Everworth Sdn Bhd* [2005] 2 CLJ 273 where it was held if the statutory notice had made reference to a non-existent sub-section, it will be fatal. In that case the statutory notice issued by the petitioner had made reference to s 218(e) and (f) of Act 125, which does not exist. The court held G the petitioner had failed to specifically state the correct position. It was further held since the petition was founded on the statutory notice under s 218 of Act 125, any defect in that notice was fatal and the statutory notice could not be used as a foundation to launch a petition. The defect was prejudicial to Everworth Sdn Bhd as it was put in the disadvantage of having to phantom H whether to limit its reply in respect of the statutory demand under s 218(1) of Act 125 which provide different circumstances in which a company may be wound up or to answer to the other matters under s 218(2)(b) of the said Act. In that case His Lordship Apandi Ali J (as he then was) referred to two earlier cases which dealt with similar issue:

I

22.1 In *Sungei Rinching Sdn Bhd v Sri Keluarga Sdn Bhd* [1996] 2 MLJ 199; [1996] 3 CLJ 44, Court of Appeal held a statutory notice under section 218(2)(a) of Act 125 which demanded a judgment sum together with interest and costs but did not specify the amount of costs payable by the company was held to be valid. This was because the sum demanded was the same amount as in the original judgment and

therefore there was no dispute as to the sum owed and that the company was clearly not in any way misled in that respect; and

22.2 In *Malaysia Air Charter Company Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 MLJ 657; [2000] 2 CLJ 160, the Federal Court held a notice under section 218(2)(a) Act 125 need not specify the exact sum due as at the date of the demand. So long as the sum due exceeds RM500 and remain unpaid after a demand has been made there is neglect to pay such sum within the meaning of section 218(2)(a) Act 125. The Federal Court endorsed the Court of Appeal decision that the failure to quantify the actual sum due in the section 218 notice did not render the demand invalid. In this respect the facts in *Malaysia Air Charter Company Sdn Bhd v Petronas Dagang Sdn Bhd* case is similar to the facts in the instant case, namely, the claim made in the statutory notice was in respect of a judgment debt. Petronas Dagang Sdn Bhd had obtained a judgment in default of appearance for a sum of RM334,118.79 (together with interest at the rate of 8% per annum from 28 October 1998 until date of payment) against *Malaysia Air Charter Company Sdn Bhd v Petronas Dagang Sdn Bhd.*

23 It must be noted the primary issue dealt by the court in the 3 cases above was the validity of a statutory notice issued under section 218 Act 125, and not the petition. The fact that a winding up petition is founded on a statutory notice it is therefore pertinent as illustrated in the 3 cases cited above, to ensure the statutory notice is legally proper to avoid challenge on the statutory notice so as to avoid consequential challenge on the petition itself. As the statutory notice under section 218 Act 125 forms the basis of a petition, one will have to peruse the contents of the petition as a whole and not read its headings or intitulement in isolation to determine whether the statutory notice and/or the petition is defective. The statutory notice served on the respondent will be discussed later.

24 Respondent cited *Wong Thai Kuai & Anor v. Kansas Corp Sdn Bhd* [2007] 4 MLJ 33 where it was held failure and/or omission on the part of the petitioners to state in its intitulement under which limb of section 218 Act 125 the petitioner was moving the court is fatal and that was one of the reason on which the petition was dismissed. His Lordship Ramly Ali J (as he then was) referred to the decision of Court of Appeal in *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 as follows:

> *An originating process requiring an intitulement* must state, with sufficient particularity, *either in its heading or in its body*, the statute or rule of court under which the court is being moved, otherwise it would be an embarrassing pleading and liable to be struck out ...
>
> Further, the court held that:
>
> The summons does not ... state any particular rule of court in its intitulement. Now, I think that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from

A one statute to another as it pleases him without any warning whatsoever to his opponent or the court, it would be a mockery of the principle that *there must be no surprise in civil litigation* ...

(Emphasis added.)

B

[23] It must be noted *Wong Thai Kuai*'s case was decided on its facts, in particular the claim made against the respondent was in respect of a disputed sum. As such it is vital for the specific limb under s 128 of Act 125 be cited in the intitulement. Whereas in this instant case the petition was grounded on a C demand made in respect of a judgment debt the sum of which was clearly stated in the statutory notice served on the respondent and very much within the respondent's knowledge. It is not a disputed sum.

[24] It is appropriate at this juncture to look at the brief relevant facts in D *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 for this court to appreciate the context and significance of the Court of Appeal decision, in particular with reference to the paragraphs quoted above. In that case the respondent took out an originating summons claiming vacant possession purportedly under O 89 of the Rules of the High E Court 1980 of a premise where he is the registered proprietor. The originating summons intituled generally in the Rules of the High Court 1980 and does not specify under which order of the Rules of the High Court 1980 was the court moved. The appellant's case — he was a tenant holding over and as such O 89 is not applicable. The respondent was of the view the originating summons is F not under O 89 since it also seek other reliefs. The respondent contended the application is under O 28 for vacant possession. Plaintiff's failure to specify the relevant provision had unduly forced the court to scrutinise the originating summons and hear the parties' submission before it could determine the relevant provision under which the court was moved. Order 7 r 2(1A) of the G Rules of the High Court 1980 (repealed by Rules of High Court 2012 but O 7 r 2(A) remain the same) requires every originating summons to state in its intitulement the specific statutory provision under which the court is being moved. Thus the remark made by Court of Appeal as quoted above. Based on *Cheow Chew Khoon*'s case, the relevant specific provision must be stated with H sufficient particularity either in its heading or body the statute or rule of court under which the court is being moved. The reason being — to give fair and proper notice to the other party for purposes of preparing his case in order to avoid surprise and the pleadings from being struck off.

I **[25]** The Winding-Up Rules do not require the specific statutory provision under which the court is moved to be stated in the intitulement of a winding up petition. Since there is no statutory requirement to do so, on that reason alone I am of the view the petition is not defective. Assuming for a moment the petition is defective, is the respondent placed in a disadvantage position or

prejudiced or miscarriage of justice was occasioned on the respondent? I am of the view the respondent is not placed in such a position and my reasons are as discussed below.

[26] Close scrutiny of the petition ('encl 1') shows that it had followed strictly Form 2 of Winding-Up Rules as far as providing information and details about the company, namely, its registered office, capital, objects and importantly the circumstances which led to the issuance of the petition. This information is found at para 5 where specific reference was made to the statutory notice issued pursuant to s 218 of Act 125 by the petitioner's solicitor and served on the respondent. The statutory notice was in fact attached to the petition as exh 'A2'. Upon perusal of the statutory notice dated 6 April 2015, its content is as follows:

(a) the demand made was in respect of a judgment debt ie a specific amount of RM128,911.26 together with interest at 5%pa on the said sum from 30 November 2014 until date of full realisation and cost pursuant to the consent judgment dated 21 August 2014 was made;

(b) the respondent was required to pay the sum together with interest within 21 days from date of receipt of the notice; and

(c) failure by the respondent to pay within the specified time is deemed to be unable to pay the debt and winding up action will be taken against the respondent.

[27] It can be seen that the statutory notice issued by the petitioner has all the prerequisites of a valid and good notice in the context of s 218 of Act 125. This good notice is part and parcel of the petition. For all intent and purposes the petition has complied, with the necessary variations, with Form 2 of the First Schedule of the Winding-Up Rules. The respondent is put to notice of the claim made by the petitioner, namely a judgment debt which, up to the date of the presentation of the petition remain unsatisfied.

[28] It is therefore my considered opinion that the respondent is not placed in a disadvantaged position or prejudiced by mere omission, in the intitulement, of the specific provision of s 218 of Act 125. I am also of the view such omission cannot be said to have caught the respondent by surprise because the petition sets out the primary facts and vital exhibits are attached to the petition. It tells all that need to be told. Unless the respondent for reasons best known to them choose only to read the intitulement and ignore the rest of the content of the petition, then they do it at their own peril. For that they cannot now put the blame on the intitulement.

[29] For all intent and purposes the petition, read together with the statutory notice, had properly and adequately put the respondent to notice of the

demand in respect of the judgment debt which was due and presently owing to the petitioner. The respondent was also put to proper and adequate notice of the consequences of its failure to pay within the stipulated period, namely, it shall be deemed to be unable to pay its debt and a winding up action is inevitable. As such it cannot be said that the failure to cite the specific provision under s 218 of Act 125 in the intitulement was so fatal that it had prejudiced the respondent to the effect the respondent was not able to fathom the necessary action or reply towards the petition.

[30] It is noted the respondent did not demonstrate how such omission is fatal to them. The respondent also did not, at any time during the proceeding, challenge the validity of the statutory notice. It is clearly an afterthought on the part of the respondent to raise technical defect in a last minute attempt to find fault with the petition for purposes of it being strike out.

[31] Based on the premise, I am of the view there is no technical defect in the petition. A winding up petition is not solely about the intitulement, because there are other part of a petition which provide details which must be given due attention, especially so in a winding up petition which has drastic consequences on a company. Therefore the petition must be read as a whole and not in isolation so as to give the petition the due effect it so deserved. As I have stated above, the omission to specify the relevant provision of s 218 is not a technical defect. Even if such omission is considered as technically defective for want of clarity in the intitulement, based on the reasons adumbrated above, it is my considered opinion the defect is not fatal.

[32] The petitioner's counsel submitted there is nothing wrong with the petition because the registrar had issued a certificate to certify the requirements under r 32(1) Winding-Up Rules had been complied with (Registrar's Certificate). It must be noted a certificate under r 32(1) Winding-Up Rules is not conclusive and may be set aside if the certificate is issued not in the manner required by the Winding-Up Rules. This principle was established in *Ho Siew Choong & Ors v Everworth Sdn Bhd* and *Petro-Pipe Industries (M) Sdn Bhd v Fieldwork Engineering Sdn Bhd* [2003] 1 MLJ 417; [2003] 1 CLJ 777. The courts in those cases has held the issuance of a registrar's certificate did not prevent the court from finding that there was no due compliance with the said r 32(1) by the petitioner. As I do not accept the respondent's argument that the petition is defective for not specifically stating the exact provision of s 218, the issue of the validity of the registrar's certificate does not arise.

Petition defective due to erroneous consent judgment

[33] I now move on to the respondent's contention in respect of the genuine mistake alleged (see para 11 above for the respondent's position). At the outset

it is important to bear in mind that winding up proceedings is not an execution proceedings. Her Ladyship Zaleha Zahari CAJ (as she then was) in delivering the decision of Court of Appeal in *Juara Aspirasi (M) Sdn Bhd v Tan Soon Ping* [2012] 1 MLJ 50; [2011] 1 LNS 1952 referred to *Perwira Affin Bank Bhd v Lim Ah Lee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787:

> In *Perwira Affin Bank Bhd v Lim Ah Lee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787 Abdul Hamid Mohamad FCJ (as he then was) in delivering the decision of the Federal Court held that a bankruptcy proceeding is not a writ of execution, which was a continuation of the existing proceeding to enforce the judgment provided by the same rules of court, ie, the Rules of the High Court 1980. Bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt, and the object being to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with the loss of control over his properties to the Official Assignee. The fact that it is based on a judgment does not necessarily make it a continuation of the existing proceedings. It is a proceeding by way of petition just like divorce, winding up or election to name a few, bears the characteristics of a fresh proceeding unlike an execution proceedings. This principle is equally applicable to winding up proceedings.
>
> *In Re A Company* [1915] 1 Ch 520, the question before the Court of Appeal was whether the execution on a judgment included the petition of winding up of a company. Lord Cozens-Hardy MR said at p 525:
>
> *... Now 'execution on the judgment' is a technical term. It is a legal process by which the judgment creditor, in that character and for his sole benefit, by a proceeding in the same action seeks to satisfy his judgment wholly or partially. I think it is plain that a winding up petition is not execution on a judgment. It lacks almost every element of such an execution*.

[34] In *Juara Aspirasi*, the petitioner issued a notice to the respondent demanding payment of a sum in respect of which judgment was obtained against the respondent. The court held, inter alia, even if there was an ad interim stay of the court order in place, there was no legal impediment for the petitioner to file a winding up petition against the respondent as bankruptcy and winding up proceedings was not within the ambit and meaning of 'execution' proceedings as provided under the Rules of High Court 2012.

[35] In *Gulf Business Constructions (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34; [2010] 8 CLJ 775 the petitioner obtained a court order against the respondent for the release and refund of a certain amount of trust money. Premised upon the court order the petitioner served a notice under s 218(1)(e) of Act 125 on the respondent. The Court of Appeal held:

> It is legally impossible for the respondent to challenge the validity of the court order dated 3 June 2005 in the winding up proceedings. If high authority is required for this simple proposition, the case of *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 (SC) a decision of Lee Hun Hoe CJ (Borneo) should be

referred to. There at p 305, His Lordship had this to say:

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See In *re Easton* (1893) 10 Mor 111; 9 TLR 409. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings.

In the same vein, Steve Shim J (later Chief Judge, Sabah & Sarawak) in *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Shariff bin Haji Hussain)* [2000] 6 MLJ 155; [2000] 1 LNS 197, had this to say at p 158 of the report:

> It is trite law that an order, even if irregular, is valid and enforceable until set aside. This principle is particularly relevant in bankruptcy proceedings where the court generally will not look behind the judgments or order save in very limited circumstances of fraud or illegality, etc.

[36] It seems the respondent's submission that there is no debt due because the consent judgment was a mistake is based on the premise that the winding up proceeding is an execution proceeding for the sole purpose of executing the so called erroneous consent judgment. The courts has expressed in unequivocal terms a winding up court is not the forum to challenge the validity of a court order or judgment. A winding up court therefore cannot go behind the judgment even if it is irregularly obtained except where there was fraud or illegality involved. Applying this principle alone, the challenge mounted by the respondent cannot be sustained.

[37] Even if this court were to look for element of fraud or illegality in respect of the consent judgment, based on the affidavit evidence adduced, there is none. For the consent judgment to be set aside the respondent must show the judgment was obtained fraudulently or by reason of mutual mistake of the parties regarding a material fact: *Au Yuan Chee v Lim Leong Thiam & Ors* (1956) 2 MC 260. The consent judgment was recorded based on the agreement of both parties after the parties' negotiation, which involved proposals and counter proposals to resolve the claim and defence both parties has against each other. This is fortified by the documents exhibited as 'CYC4' in encl 10. Even if the respondent's argument of mistake is accepted, it is a unilateral mistake on its part alone. As far as the petitioner is concerned, the consent judgment is good and enforceable. The affidavit evidence shows the respondent was represented by a legal counsel at all material times in the KLSC suit and this court can only conclude, on the facts, the consent judgment was entered into willingly and consciously by the respondent.

[38] The respondent submitted the sessions court had seen merits in the respondent's argument (that the consent judgment was entered erroneously) when it ordered the stay of the execution of the consent judgment. On what basis such submission was made the respondent did not say. In any event, as winding up proceedings is not an execution process, I am in agreement with the petitioner's argument the winding up court is not concerned with the merits of the consent judgment. As such it does not matter even if the respondent had filed a fresh suit to set aside the consent judgment. What matters here is the creditor, namely, the petitioner pursuing its right to recover the judgment sum from the debtor, namely, the respondent pursuant to a notice issued under s 218 of Act 125.

[39] The respondent also contended the presumption of the respondent's inability to pay its debt does not arise because there is no debt under the erroneous consent judgment. It follows therefore, no creditor-debtor relationship between the petitioner and the respondent. In support of this contention the respondent cited *Public Bank Bhd lwn Search Realty (M) Sdn Bhd* [2001] 3 MLJ 119. In that case the High Court allowed the respondent's application to strike out the winding up petition presented by the petitioner bank on the ground it had failed to prove it was a creditor. Apart from notice under s 218 of Act 125, the petitioner bank did not provide any evidence to show that the respondent was the guarantor of the pecuniary facility granted to the principal debtor (against whom judgment was obtained) and the evidence on the calculation of the amount owed to the said third party. His Lordship Mohd Ghazali H had this to say in his judgment:

> Pada saya, pempetisyen tidak langsung mendedahkan fakta-fakta yang material bagi menyokong petisyen mereka untuk menggulung responden ... Apa yang jelas dan tidak dipertikaikan ialah pempetisyen tidak memperolehi penghakiman terhadap responden selaku penggerenti bagi amaun tersebut yang dituntut itu ...
>
> Apa yang jelas ialah amaun tersebut yang terdapat dalam notis s 218 Akta tersebut dan dalam petisyen, yang didakwa dihutang oleh responden, adalah amaun yang berbeza jika dibandingkan dengan hutang penghakiman yang telah diperolehi.
>
> Dalam petisyen ini, pempetisyen belum memperolehi hutang penghakiman terhadap responden bagi amaun tersebut yang mana, jika telah diperolehi sebelum petisyen dikemukakan, akan dengan jelas melayakkan mereka memanggil diri mereka pemiutang. Tanpa keterangan yang menunjuk responden berhutang kepada mereka saya berpendapat petisyen tidak boleh berdiri ...

[40] The facts in the *Public Bank* case clearly shows the petitioner bank, at the time when the winding up petition was presented, was not a creditor of the respondent. Further, the documents adduced before the court there showed the amount demanded by the petitioner was different from the judgment sum obtained by the petitioner bank against the principal debtor. The court ruled if the bank had obtained judgment against the respondent, the bank is a creditor

of the respondent and is entitle to initiate the winding up proceedings.

[41] In this instant case, the respondent had obtained a court judgment in respect of the sum demanded and such sum was the same amount stated in the petition. Going along the reasoning of *Public Bank* case the petitioner is, for all intent and purposes a creditor vis-a-vis the respondent and the petitioner has every right to initiate winding up proceeding against the respondent regardless what its other motives. As has been decided by the courts time and again, the petitioner cannot be denied of its fruit of litigation. It follows that this court cannot deprive the petitioner from exercising its legal rights to recover the judgment sum it had duly obtained under the consent judgment.

[42] Upon failure of the respondent to pay the judgment sum together with interest of 5%pa on the said sum from 30 November 2014 to date of full realisation and costs after the expiry of 21 days from 7 April 2015 (27 April 2015), by virtue of s 218(2)(a) the respondent is deemed insolvent. The onus is on the respondent to rebut that insolvency presumption. To rebut that presumption the company must show that it is able to pay its debts when it becomes due and payable. The test to be applied to determine its ability to pay is cash flow solvency or commercial solvency test (*Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2011] 1 CLJ 947). The respondent did not adduced evidence to rebut the insolvency presumption even though it said it is solvent and has financial viability to pay whatever legitimate claims against the respondent. Under such circumstances the presumption remains and this winding up court is empowered to exercise its discretionary power to wind up the respondent.

DECISION

[43] Premised on the above, I allow the petition on the terms as prayed in the said petition.

Petitioner's petition allowed.

Reported by Afiq Mohamad